STATE OF MICHIGAN

COURT OF APPEALS

BARBARA FIEBING and JOHN KASBEN,

Plaintiffs/Counter-Defendants-Appellees,

and

CHARLES FIEBING III, CHARLES M. FIEBING, CRAIG S. FIEBING, and MARIA PILAR FIEBING,

Plaintiffs-Appellees,

v

EDWIN J. KASBEN,

Defendant/Counter-Plaintiff-Appellant,

and

WILLIAM E. KASBEN,

Defendant.

UNPUBLISHED
March 28, 2006

No. 257905
Leelanau Circuit Court
LC No. 03-006151-CH

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Defendant Edwin Kasben appeals as of right from the trial court's order granting plaintiffs John Kasben, Barbara Fiebing, Charles Fiebing III, Charles M. Fiebing, Craig S. Fiebing, and Maria Pilar Fiebing summary disposition under MCR 2.116(C)(10). This case arises out of a dispute between various family members regarding the value of timber removed from two parcels of land, known as the Heimforth Farm and the Ferguson North 40 Farm (Ferguson Farm). The Ferguson Farm is jointly owned by Barbara Fiebing, Charles M. Fiebing, Charles Fiebing III, Craig Fiebing, and Maria Pilar Fiebing, as tenants in common. Edwin Kasben retained a life estate in the Ferguson Farm. The Heimforth Farm is jointly owned by

Barbara Fiebing, John Kasben, Joseph Kasben,[1] and defendant William Kasben, as tenants in common. We affirm in part, reverse in part, and remand this case for further proceedings.

I. The Trial Court's Sua Sponte Grant of Summary Disposition

Edwin Kasben first argues that the trial court erred by sua sponte granting plaintiffs summary disposition on their complaint because there was a genuine issue of material fact regarding whether Edwin Kasben had the right to remove timber from the Heimforth Farm. Edwin Kasben argues that, even accepting the trial court's ruling that a particular deed to the Heimforth Farm was valid, there remains a question of fact regarding Edwin Kasben's right to remove the timber. Edwin Kasben contends that a determination that he did not hold title to the Heimforth Farm[2] does not resolve whether he nevertheless had rights to the Heimforth Farm timber. We conclude that summary disposition was not proper with respect to plaintiffs' complaint. We review de novo a trial court's ruling with regard to a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

MCR 2.312(B)(1) provides, in pertinent part:

> Each matter as to which a request is made is deemed admitted unless, within 28 days after service of the request . . . the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter.

"[A]dmissions resulting from a failure to answer a request for admissions may form the basis for summary disposition." *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991); see also *Janczyk v Davis*, 125 Mich App 683, 690; 337 NW2d 272 (1983).

Turning first to Edwin Kasben's counterclaim, Edwin Kasben did not respond to plaintiffs' requests for admissions until December 26, 2003, over seven months after plaintiffs' May 20, 2003, request. Under MCR 2.312, because Edwin Kasben failed to respond timely to plaintiffs' requests for admissions, they are deemed admitted. Therefore, pursuant to the language of plaintiffs' requests for admissions, Edwin Kasben admitted that he did not have evidence to support his allegations that (1) plaintiffs interfered with his timber rights, (2) he sustained a general loss of income as a result of plaintiffs' actions, (3) he sustained a general increase in costs of conducting his day-to-day farming operations, and (4) he sustained a loss of integrity and his esteem was lowered in the eyes of those with whom he routinely conducted business. Thus, we conclude that summary disposition was appropriate with respect to Edwin Kasben's counterclaim.

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[1] Joseph Kasben was a plaintiff in the action below but is not participating in this appeal.

[2] At the time this appeal was filed there was a prior appeal pending (the "quiet title action") regarding the validity of the Heimforth Farm deed. On August 25, 2005, we affirmed the trial court's finding that there was no undue influence and that the deed was valid. *Kasben v Kasben*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2005 (Docket No. 253345).

The trial court then sua sponte granted summary disposition to plaintiffs on their complaint, which dealt, in part, with whether Edwin Kasben had the right to enter the Heimforth Farm to remove timber. To determine the parties' respective rights in the Heimforth Farm, the trial court relied on the Leelanau Circuit Court's December 30, 2003, decision in the "quiet title action," in which it was held that Joseph Kasben, William Kasben, John Kasben, and Barbara Fiebing each owned a one-fourth interest in the Heimforth Farm.

Edwin Kasben argues that summary judgment granted on his counterclaim resolved only issues relating to the *ownership* issues of the Heimforth Farm and that a genuine issue of material fact remained with respect to whether he had a right to *remove timber* from the property, under the terms of an oral agreement. Thus, Edwin Kasben argues, the trial court's sua sponte grant of summary disposition with respect to plaintiffs' complaint was inappropriate.

In its resolution of plaintiffs' complaint, the trial court stated simply that Edwin Kasben had no ownership interest in the Heimforth Farm based on the decision in the quiet title action. Collateral estoppel applies to the pertinent issue of fact resolved in the quiet title action because it was an essential fact to the action that was actually litigated and determined by a valid and final judgment. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). Edwin Kasben argues that there was no final judgment because, at the time of the trial court's decision in the instant case, the quiet title action was pending appeal. However, the order entered by the trial court on February 12, 2004, is a "final judgment" as defined by MCR 7.202(6)(a)(i) because it disposed of all the rights and liabilities of the parties in that action with regard to title ownership of the Heimforth Farm. Further, neither party alleges that it did not have a full opportunity to litigate the issue of title ownership of the Heimforth Farm. *Monat*, *supra* at 682-683. Finally, mutuality of estoppel applies because both plaintiffs and defendant Edwin Kasben are bound by the factual issue that title ownership in Heimforth Farm does not belong to Edwin Kasben. *Id*. at 683-685. Thus, the trial court's finding that Edwin Kasben has no title ownership interest in the Heimforth Farm based on the finding in the quiet title action was appropriate.

However, the record is unclear whether the issue of the rights to cut timber on the Heimforth Farm was resolved in the quiet title action in addition to the issue of title ownership. This Court's August 25, 2005, opinion in the quiet title action does not address timber rights; rather, it simply resolves the issue of whether an option contract existed to repurchase the property and whether undue influence was present. If the issue of timber rights was not in fact resolved in the quiet title action, then a material issue of fact remains regarding plaintiffs' claim that Edwin Kasben was wrongfully removing timber from the Heimforth Farm.

We conclude that the trial court erred by entering summary disposition on its own motion because the record is unclear whether an issue of material fact existed with regard to the issue of timber rights in the Heimforth Farm. Therefore, we remand this case to the trial court to state if, and how, the holding in the quiet title action specifically resolved the timber rights issue raised by Edwin Kasben in his answer, in addition to the ownership rights claimed by plaintiffs. After undertaking this analysis, the trial court must proceed with the case accordingly.

II. William Kasben's Rights to Enter the Ferguson Parcel as Edwin Kasben's Agent

Next, Edwin Kasben argues that the trial court erred in failing to adjudicate the issue of William Kasben's right to act as Edwin's agent with respect to removing timber from the Ferguson Farm.

In ruling on plaintiffs' motion for a preliminary injunction, the trial court stated that William Kasben "may exercise the rights of Edwin Kasben's life lease on the Ferguson property, including, but not limited to, tree and timber harvesting, at the direction of Edwin Kasben." However, in its later summary disposition ruling, the trial court failed to readdress William Kasben's authority to remove timber from the Ferguson Farm on Edwin Kasben's behalf. Instead, the trial court held that William Kasben was barred from entering the Ferguson Farm "for any purpose." The trial court stated that William Kasben had no interest in the Ferguson Farm and that William Kasben "has no right to trespass upon that property or to remove any timber from it," stating that "[u]ntil further order of this Court, Defendant William E. Kasben is enjoined from entering upon the Ferguson parcel *for any purpose*." (Emphasis added.)

The trial court's assertion that William Kasben has no right to "enter[] upon the Ferguson parcel for any purpose" makes the trial court's intention sufficiently clear with regard to William Kasben's rights. Specifically, the trial court's language unambiguously prevents William Kasben from entering the property for any purpose, and this would include for the purpose of acting as Edwin Kasben's agent.

However, this final decision significantly altered the state of affairs from the time plaintiffs' preliminary injunction was denied, and the trial court failed to state sufficient reasons on the record for this change. The initial denial of plaintiffs' motion for a preliminary injunction had the effect of continuing to permit William Kasben, as Edwin Kasben's agent, to remove timber from the Ferguson Farm, in part because the trial court thought it likely that Edwin Kasben would prevail on his claim to the timber rights in the Ferguson Farm. The final decision and order, however, states that William Kasben may not enter onto the Ferguson Farm for any purpose. Thus, the court's summary disposition ruling amounted to a permanent injunction preventing William Kasben's entry onto the Ferguson Farm.

In determining whether to issue an injunction, a trial court must consider the following factors:

> (a) the nature of the interest to be protected,
> (b) the relative adequacy to the plaintiff of injunction and of other remedies,
> (c) any unreasonable delay by the plaintiff in bringing suit,
> (d) any related misconduct on the part of the plaintiff,
> (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
> (f) the interests of third persons and of the public, and
> (g) the practicability of framing and enforcing the order or judgment. [*Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 106; 662 NW2d 387 (2003).]

The trial court's decision and order did not reflect the use of the proper procedure for issuing an injunction against William Kasben.

Thus, while we offer no opinion regarding whether the trial court could unequivocally permanently enjoin William Kasben from entering onto the Ferguson property, we conclude that the trial court erred by failing to analyze the issue under the injunction standard. We remand this case to the trial court either to articulate a basis for prohibiting William Kasben from entering onto the Ferguson Farm as Edwin Kasben's agent or to take other appropriate actions.

III. Trial Court's Entry of Judgment in Favor of Charles M. Fiebing

Edwin Kasben argues that the trial court erred by entering judgment in favor of Charles M. Fiebing because Joseph Kasben's quitclaim deed to Charles M. Fiebing for his interest in the Heimforth Farm only assigned the interest Joseph Kasben had on July 23, 2004, the date of the deed. Edwin Kasben argues that the deed did not assign the value of the timber removed in October 2002 or the diminution in value of the property as a result of the timber removal. We find no error on the part of the trial court with respect to this issue.

The original complaint listed both Joseph Kasben and Charles M. Fiebing as plaintiffs in an action to recover damages for wrongful removal of timber from the Heimforth and Ferguson Farms. Joseph Kasben sought a preliminary injunction and money damages as part owner of the Heimforth Farm for the removal of timber from the parcel. Charles M. Fiebing sought a preliminary injunction and money damages as part owner of the Ferguson Farm for the removal of timber from that parcel. Edwin Kasben filed a counterclaim against plaintiffs, including both Charles M. Fiebing and Joseph Kasben, for alleged interference with his property rights on both the Heimforth Farm and the Ferguson Farm.

Joseph Kasben sold his interest in the Heimforth Farm to Charles M. Fiebing while the case was pending. On September 22, 2003, Joseph Kasben filed a motion to substitute parties, asking to be dismissed from the action. MCR 2.202(B) provides:

> **Transfer or Change of Interest.** If there is a change or transfer of interest, the action may be continued by or against the original party in his or her original capacity, unless the court, on motion supported by affidavit, directs that the person to whom the interest is transferred be substituted for or joined with the original party, or directs that the original party be made a party in another capacity. Notice must be given as provided in subrule (A)(1)(c).

MCR 2.202(A)(1)(c) states that "[s]ervice of the statement or motion must be made on the parties as provided in MCR 2.107, and on persons not parties as provided in MCR 2.105."

The language of Joseph Kasben's motion to substitute parties – specifically, that he conveyed all of his "right, title and interest" to Charles M. Fiebing – was sufficient to put Edwin Kasben on notice that he was defending an action of Charles M. Fiebing with respect to a monetary claim for removal of timber and did not merely provide notice that Charles M. Fiebing had simply acquired Joseph Kasben's real estate title in the Heimforth Farm.

We conclude that the trial court did not err by awarding Charles M. Fiebing $6,331.73, because he was a named plaintiff in the original complaint against Edwin Kasben and because he was properly substituted as the successor in interest to Joseph Kasben's claim.

IV. Prejudgment Interest Award

Finally, Edwin Kasben argues that the trial court erred as a matter of law by awarding interest at 4.295% from January 2, 2003. We agree.

MCL 600.6013(8) sets a variable rate of interest on money judgments, stating that

> for complaints filed on or after January 1, 1987, [the interest rate] . . . is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1 . . .

According to the Michigan State Court Administrative Office (SCAO), the following interest rates apply to the instant case:

1/2/03 – 6/30/03	4.189%
7/1/03 – 12/31/03	3.603%
1/1/04 – 6/8/04	4.295%

However, the trial court's June 8, 2004, judgment provides:

> Pursuant to MCL 600.6013, Plaintiffs Barbara Fiebing, John Kasben and Charles M. Fiebing, are entitled to prejudgment interest at the current statutory rate of 4.295%, from January 2, 2003, the date the Complaint was filed, until the judgment is paid in full.

The trial court's award was not in accordance with the SCAO guidelines interpreting the statute because the 4.295% interest rate was not effective until January 1, 2004. Instead, the interest rate from the time of the filing of the complaint on January 2, 2003, until June 30, 2003, was 4.189%, and the interest rate from July 1, 2003 to December 31, 2003, was 3.603%.

Edwin also argues that all interest should be refunded to him because plaintiffs wrongfully took advantage of a usurious interest rate. We disagree. MCL 438.32 states:

> Any seller or lender or his assigns who enters into any contract or agreement which does not comply with the provisions of this act or charges interest in excess of that allowed by this act is barred from the recovery of any interest, any official fees, delinquency or collection charge, attorney fees or court costs and the borrower or buyer shall be entitled to recover his attorney fees and court costs from the seller, lender or assigns.

MCL 438.32 is a provision of the civil usury act. Plaintiffs are neither "sellers" nor "lenders" under the circumstances at issue here, and we can find no language in the act indicating that prejudgment interest is a matter the Legislature intended to address in this act. Thus, we conclude that MCL 438.32 does not apply to prejudgment interest awards, and, therefore it does not bar recovery of interest or require payment of attorney fees by plaintiffs.

We conclude that the trial court's award of prejudgment interest was contrary to statute. We remand this case to the trial court to amend the interest rate in accordance with this opinion.

Affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Patrick M. Meter